Noor Haiyati bte Saad & Ors v Said bin Ismail

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12-09-1989
KC VOHRAH J
16 JUNE 1991

Evidence — Police report made in the course of investigations — Admissibility — Whether report is privileged for the purposes of a civil trial — Criminal Procedure Code (FMS Cap 6), ss 112 & 113 — Evidence Act 1950, ss 17, 18 & 21

Civil Procedure — No case to answer — Plaintiffs failing to adduce evidence of how accident took place

The second plaintiffs were the administrators of the estate of Fadzil bin Ismail ('the deceased') who died as a result of a motor accident involving a lorry driven by the defendant. There were no witnesses to the accident and the first plaintiff who was the deceased's pillion rider could not recall how the accident took place. The plaintiffs sought to admit into evidence a police report made by the defendant to show how the accident took place, but this was refused by the trial court. At the end of the plaintiffs' case, the defendant submitted that they had no case to answer which was accepted by the trial court. The plaintiffs appealed.

Held, dismissing the plaintiffs' appeal:

(1) The police report made one day after the accident by the driver of the motor lorry is not a first information report but a report made after police investigation had started although it is set out in the format of an information report under s 107 of the CPC.

(2) A statement made in the course of a police investigation was absolutely privileged and, therefore, inadmissible in a later civil proceeding.

(3) There being no evidence of how the accident took place, the plaintiffs had failed to discharge their burden of proof.

[Bahasa Malaysia summary

Plaintif kedua adalah pentadbir harta pusaka Fadzil bin Ismail ('si mati') yang telah meninggal akibat satu kemalangan yang melibatkan lori yang dipandu oleh defendan. Tidak ada saksi kepada kemalangan itu dan plaintif pertama yang merupakan penumpang motosikal si mati tidak dapat mengingati bagaimana kemalangan itu terjadi. Plaintif cuba memasukkan sebagai keterangan satu laporan polis yang telah dibuat oleh defendan untuk menunjukkan bagaimana kemalangan itu berlaku, tetapi mahkamah perbicaraan tidak bersetuju. Di akhir kes plaintif, defendan menghujah bahawa tidak ada kes untuk dijawab oleh mereka dan ini telah diterima oleh mahkamah perbicaraan. Plaintif telah merayu.

Diputuskan, menolak rayuan plaintif itu:

(1) Laporan polis yang dibuat sehari selepas kemalangan itu oleh pemandu lori bukanlah laporan maklumat pertama, tetapi satu laporan yang dibuat selepas penyiasatan polis telah bermula walaupun ia disediakan dalam bentuk satu laporan maklumat di bawah s 107 Kanun Acara Jenayah.

(2) Satu pernyataan yang dibuat semasa penyiasatan polis adalah teristimewa secara mutlak dan, lantaran itu, tidak boleh dimasukkan di dalam satu prosiding sivil kemudiannya.

(3) Oleh kerana tidak ada keterangan bagaimana kemalangan itu berlaku, plaintif telah gagal melaksanakan beban pembuktian mereka.]

Cases referred to

1 *MA Clyde* v *Wong Ah Mei & Anor* [1970] 2 MLJ 183 (distd)
2 *Martin Rhienus* v *Sher Singh* [1949] MLJ 201 (refd)
3 *Rengasamy Chettiar* v *Periasamy* [1937] MLJ xxv (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 111, 112, 113
Evidence Act 1950 ss 17, 18, 21

Appeal from: Civil Action No 178 of 1984 (Sessions Court, Alor Setar)

Nadarajan s/o Arumugam for the plaintiffs/appellants.
Ernest Theseira for the defendant/respondent.

Cur Adv Vult

KC Vohrah J: This is an appeal against the decision of the learned judge of the sessions court, Alor Setar, on the issue of liability in respect of an accident claim.

The accident involved a motor cycle and a lorry. There was only one witness, the first plaintiff. She was the pillion rider of the motor cycle which was ridden by her husband, now deceased (whose estate claims in the suit are represented by two administrators of his estate, the two second plaintiffs). Her evidence was sketchy and not helpful. Though it was an agreed fact that an accident occurred between the motor cycle and the lorry, no oral evidence was adduced at the trial to show the direction in which the lorry was travelling at the time of the accident. The defence counsel, at the close of the plaintiffs' case, submitted there was no case to answer. The learned judge held that the plaintiffs had not proved their case.

The accident occurred on 8 June 1983 at about 9pm along the Sungei Petani-Alor Setar road. The first plaintiff, the pillion rider, said that her husband was riding about ½m from the edge of the road in the direction of Alor Setar, riding on the correct side of the road. She heard a bang; she fell, and she became unconscious. She said that her husband had not overtaken nor did he attempt to overtake any vehicle before the accident. She was unable to say whether there was any other vehicle on the road. In other words she could not state where the defendant's lorry was in relation to the motor cycle, let alone the direction in which it was travelling.

The sketch plan shows the deceased's motor cycle lying partly on the road and partly on the sidetable on the same correct side of the road along which the deceased had ridden. The plan shows broken pieces of glass and bloodstains at a point 1.6m from the left side of the road and located near the fallen motor cycle. The learned judge did not find the sketch plan helpful. I agree with her on that.

There was a report of the driver of the lorry which was included in Part II of the agreed bundle, meaning that there was dispensation of formal proof of its existence though the contents were not admitted. In that report made one day after the accident, on 9 June 1983 at 1.30pm, the driver admitted that he was travelling in a direction opposite to that of the rider of the motor cycle. If that admission had been considered by the court, it would have meant that the plaintiffs had, ex facie, proved their case as the first plaintiff had testified that her husband was riding on the correct side of the road, ½m from the left edge of the road and that he had not overtaken nor had he attempted to overtake any vehicle. And since the defendant did not make his defence (he was absent) it would have meant that judgment should have been entered in the plaintiffs' favour. But the judge held that the report was inadmissible. Counsel for the plaintiffs argued that the judge, Madam Ho, was wrong in holding the report inadmissible. He argued that the admission in the report of the driver of the lorry that he was travelling in a direction opposite to that of the rider of the motor cycle, being a first information report and not a statement made in the course of police investigation under the Criminal Procedure Code (FMS Cap 6) ('the CPC'), should have been admitted under ss 17, 18 and 21 of the Evidence Act 1950. He relied on the Federal Court case of *MA Clyde* v *Wong Ah Mei & Anor*[1] to support his argument. This is what Gill FJ (as he then was) said in that case at pp 184-185:

> It is contended for the appellant that the police report was in fact a statement in the course of police investigation because the evidence that he arrived at the scene at 10.30pm, whereas the police report was taken down at 10.50pm before which time he had carried out some investigations. And it is argued on that basis, on the authority of *Rengasamy Chettiar* v *Periasamy* [1937] MLJ xxv and *Martin Rhienus* v *Sher Singh* [1949] MLJ 201, that the statement was absolutely privileged and therefore should not have been admitted in evidence.
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> I do not agree that the police report was in the nature of a statement in the course of investigation ... I am ... satisfied that the report was made before any investigation took place. In the circumstances, the police report was clearly a first information report and not a statement in the course of police investigation, so that the two cases relied upon for its rejection are wholly inapplicable.
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> On the assumption that the police report was a first information report, it was contended by counsel for the appellants, on the authority of *State of Gujarat* v *Hiralal Devji* AIR 1964 Gujarat 261, that it was not substantive evidence and could only be used to corroborate or contradict the maker of that report. The short answer to that is that the provisions of the Criminal Procedure Code do not apply to a civil action. *In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under ss 17, 18 and 21 of the Evidence Act 1950.* I find support for this from the decision in *Bishen Das* v *Ram Labhaya* AIR 1916 Lahore 133, with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under ss 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case. (Emphasis mine.)

The point about the police report made on 9 June 1983 by Abdullah bin Said, the driver of the lorry that was involved in the accident, is that it was made one day after the accident had occurred and after police investigation into the accident had commenced. The accident took place on 8 June 1983 at about 9pm and police investigation started the very night of the accident. This is clear from the undisputed contents of two reports (which were included in Part 1 of the agreed bundle), one a police report and another, a medical report, admitted in evidence. The first report is a police report, Alor Setar Report No 6034/83, by Constable Jamal Saad made on 8 June 1983 at 10pm at Balai Polis Trafik that he had received information relating to the accident. The medical report from a doctor at the General Hospital, Alor Setar, states that Fadzil bin Ismail (the rider of the motor cycle which met with the accident), was brought to the General Hospital, Alor Setar, on 8 June 1983 at 10pm by the police. It is a fair and reasonable inference that the police had gone to the scene of the accident and had started investigation.

Thus, it seems clear that the police report made by the driver of the motor lorry one day after the accident is not a first information report. It was a report made after police investigation had started, although it is set out in the format of an information report under s 107 of the CPC. The then FMS Court of Appeal in 1949 in *Martin Rhienus* v *Sher Singh*[2] made reference to this section, s 112, as well as to s 111 of the CPC (these sections have remained unamended save for an addition of an extra paragraph, para (v), to s 112 by Act A365 which will not affect what I have to say). Willan CJ, at p 203, had this to say of a statement made under s 112 of the CPC:

> By ss 111 and 112 of the Criminal Procedure Code, when a police officer makes an investigation:
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> (1) he may require any person to attend before him;
> (2) if such person does not so attend a warrant may be issued to enforce his attendance;
> (3) the police officer may interrogate such person on attendance; and
> (4) such person is bound to answer truly all questions put to him by the police officer making the investigation.
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> In India, where the law relating to a police investigation is similar to the local law, it was decided in *Methuram Dass* v *Jaggannath Dass* ILR 28 Cal 794 that a statement made in the course of a police investigation was absolutely privileged. The reasoning in the judgment in that case is:
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> 'In the present case the investigation was required by law; it was conducted under the provisions required by

the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all questions put to him by the police officer conducting the investigation and was punishable if he answered untruly and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a court of justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above — that was in the case of *Dawkins* v *Lord Rokeby* (1875) LR HL 744 — why public policy should not equally prevent an action being brought against him as against a witness in an ordinary court of justice.'

I agree with that decision and the reasoning for it.

In the earlier Singapore case of *Rengasamy Chettiar* v *Periasamy*,[3] the Singapore court made reference to the then equivalent section in the Straits Settlements Code to s 113 of the FMS Code. In that case, Whitley J held that a statement made in the course of police investigation was admissible for the purpose only of impeaching the credit of the maker. It has to be noted that the present s 113 of the CPC is a different provision from its equivalent provision in Singapore in 1937 when *Rengasamy Chettiar*[3] was decided or in 1949 when *Martin Rhienus*[2] was decided; it was amended in 1976 by Act A324.

In any event, that point of law decided in *Rengasamy Chettiar*[3] does not seem to arise in the context of the Court of Appeal holding that a statement made in the course of a police investigation is absolutely privileged. In *Martin Rhienus*'s case,[2] Willan CJ said at p 203:

The question was raised by the court whether the provisions of s 113 of the Criminal Procedure Code prevent a statement from being given in evidence at all, even in civil proceedings, but having decided that statements made under s 112 are absolutely privileged it is not necessary for me to decide this further question ...

There being no evidence before the sessions court to show the direction in which the lorry of the defendant was travelling, there was no evidence to show how the accident took place; the plaintiffs had failed to prove that the defendant or his servant was at fault. The judge of the sessions court was right in dismissing the plaintiffs' claims at the close of their case.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Solicitors: *Nadarajan & Co; VP Nathan & Partners.*

Reported by *Mathavan Devadas*

Ang Seng Ho v Public Prosecutor

HIGH COURT (JOHORE BAHRU) — CRIMINAL APPEAL NO 41-22-89
JAMES FOONG JC
2 FEBRUARY 1991

Criminal Law — Strict liability — When legislation can be interpreted as creating a strict liability offence — Trade descriptions — Defences — Accused not entitled to rely on defence where no statutory notice given — Trade Descriptions Act 1972, ss 3 & 24

Criminal Law — Statutory offence — False trade description — Statutory defences relate to mens rea of accused person — Whether offence is one of strict liability — Trade Descriptions Act 1972, ss 3 & 24

Trade Marks — Trade descriptions — Accused did not know that goods were imitation — Whether strict liability offence — Defences — Conditions for operation of statutory defences — Trade Descriptions Act 1972, ss 3 & 24

The appellant was charged under s 3 of the Trade Descriptions Act 1972 ('the Act') for offering to supply imitation groundnuts. The appellant claimed that he did not know that the nuts were imitation. The learned magistrate, however, found that the offence was one of strict liability and convicted the appellant.

Held, dismissing the appeal:

(1) The defences made available to an accused under s 24 of the Act relate to knowledge. It must, therefore, be implied that the offence under the Act is one of strict liability.

(2) Where an accused sought to rely on a defence under s 24(1) of the Act, he must first comply with the statutory notice and requirements laid down under s 24(2) of the Act. The whole intention of the statutory notice and requirements is to enable the relevant authorities to trace and track down the real offender.

(3) In order to rely on the defence set out in s 24(3) of the Act, the appellant had to show that he did not know and he could not with reasonable diligence have ascertained that the goods did not conform to the description or that the description had been applied to the goods. The appellant had failed to satisfy these two conditions.

(4) It was not enough for the appellant to merely state that he did not know that the groundnuts were not genuine when supplied. He had to make further enquiries from his immediate suppliers as to whether the groundnuts were genuine.

[Bahasa Malaysia summary

Perayu telah didakwa di bawah s 3 Akta Perihal Dagangan 1972 ('Akta itu') kerana membuat tawaran membekalkan kacang tanah tiruan. Perayu menyatakan bahawa beliau tidak tahu yang kacang itu adalah tiruan. Majistret, walau bagaimanapun, mendapati bahawa kesalahan itu adalah satu yang bersifat liabiliti tegas dan mensabitkan perayu.

Diputuskan, menolak rayuan itu:

(1) Pembelaan yang ada untuk seorang yang didakwa di bawah s 24 Akta itu bersangkut dengan pengetahuan. Jadi adalah tersirat bahawa kesalahan di bawah Akta itu adalah bersifat liabiliti tegas.

(2) Apabila seorang yang didakwa cuba bergantung kepada satu pembelaan di bawah s 24(1) Akta itu, beliau